

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT ADAIR,

Plaintiff-Appellee,

v

UTICA COMMUNITY SCHOOLS,

Defendant,

and

UTICA SKILLED TRADES ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED

May 13, 2010

No. 288286

Macomb Circuit Court

LC No. 07-003776-CK

Before: MURPHY, C.J., AND JANSEN AND ZAHRA, JJ.

ZAHRA J., (*concurring in part and dissenting in part*).

I concur in the majority opinion as it relates to all the liability issues. I also concur in the majority opinion to the extent that affirms the economic damages awarded by the jury. However, I respectfully dissent from the majority's conclusion that the \$225,000 award for exemplary damages should be affirmed. I would vacate this award and reinstate the \$10,000 award for emotional damages.

I conclude that counsel for USTA sufficiently voiced objection to the notion of exemplary and punitive damages. Prior to closing arguments and the giving of jury instructions, the trial court and counsel discussed proposed instructions on the record. When they reached the issue of instructing on exemplary damages, the USTA's attorney argued, "I'm not aware of any authority that would allow exemplary damages in a case like this." Plaintiff counsel proceeded to cite *Schoonover v Consolidated Freightways Corp of Delaware*, 147 F3d 492 (CA 6, 1998), in support of exemplary damages. Plaintiff counsel stated that *Schoonover* was a federal case in which the term "punitive" was still being used. Plaintiff counsel then stated, "We don't have punitives. It's exemplary in Michigan." Plaintiff counsel argued that *Schoonover* reflected that the court had the discretion to allow the awarding of exemplary damages. The trial court then ruled:

Well, I'm going to allow [plaintiff] to argue it, but the standard is pretty stringent. I mean you've got to show malice, recklessness or deceit. If you think you can convince this jury of it, I'm going to let you present that argument. I'm going to read that instruction.

The record does not reveal on what authority the court concluded that exemplary damages are recoverable where malice, recklessness, or deceit are established; it appears that the language or principle was simply contained in the proposed instruction on exemplary damages provided to the trial court by plaintiff:

Exemplary damages are damages awarded in addition to actual damages when the Defendant acted with recklessness, malice or deceit. In the event you find that the union acted toward Plaintiff Adair in a manner that was reckless with malice or with deceit, you may award Plaintiff Adair exemplary damages in an amount that you determine the union owes.

This instruction is erroneous for several reasons. The most obvious error is the instruction does not identify the basis for an award of exemplary damages. While mentioning that plaintiff must establish that defendant acted "maliciously, wilfully and wantonly" toward plaintiff, there is absolutely no mention that exemplary damages are to compensate a plaintiff for any "humiliation, sense of outrage, and indignity." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980). Here, the jury was improperly instructed to award exemplary damages for no other reason than defendant acted with recklessness, malice or deceit regardless of any injury actually suffered by plaintiff.

Further, the instruction allows for the jury to punish defendant. "Punitive damages, which are designed to punish a party for misconduct, are generally not recoverable in Michigan." In *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 400; 729 NW2d 277 (2006). There is an exception where punitive damages are authorized by statute, *id.*, but there is no claim here that punitive damages are authorized by statute relative to a fair representation suit. Moreover, persuasive case law forbids punitive damages in a fair representation suit. In *Int'l Brotherhood of Electrical Workers v Foust*, 442 US 42, 52; 99 S Ct 2121; 60 L Ed 2d 698 (1979), the United States Supreme Court held:

Because general labor policy disfavors punishment, and the adverse consequences of punitive damages awards could be substantial, we hold that such damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance. Accordingly, we reverse the judgment below insofar as it upheld the award of punitive damages.

The *Foust* Court provided the following reasoning in support of its decision to deny punitive damages in a fair representation action against a union:

Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." In respondent's view, this extraordinary sanction is necessary to vindicate an employee's right to fair representation. Because actual damages caused by a union's failure to pursue grievances may be *de minimis*, respondent

contends that a strong legal remedy is essential to encourage unfair representation suits and thereby inhibit union misconduct.

We do not doubt that the prospect of lucrative monetary recoveries unrelated to actual injury would be a powerful incentive to bring unfair representation actions. Similarly, the threat of large punitive sanctions would likely affect unions' willingness to pursue individual complaints. However, offsetting these potential benefits is the possibility that punitive awards could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area.

The fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' rights. In approving "resort to the *usual* judicial remedies of injunction and award of damages when appropriate," the Court emphasized that relief in each case should be fashioned to make the injured employee whole. [*Foust*, 442 US at 48-49 (emphasis in original).]

The jury instruction improperly permitted the notion of punitive damages to be injected into the instant case.¹

Further, there is a strong likelihood, given remarks made by plaintiff counsel during closing argument, that the jury in fact awarded plaintiff punitive damages. Plaintiff counsel first argued to the jury that plaintiff was entitled to "[e]motional distress damages," which, for all intents and purposes, are exemplary damages." Plaintiff counsel argued:

Emotional distress damages, let's talk about that a little bit. And that's not on your chart. That's something that I don't have a figure to ask you for. And the reason I don't have a figure is because I asked that you, as jurors, have to within

¹ Indeed, the only standard jury instruction providing for exemplary damages, M Civ JI 118.21, "Libel—Exemplary Damages," makes a clear distinction between punitive and exemplary damages:

The damages on which I have already instructed you are called actual damages. If you find that plaintiff is entitled to actual damages, you may then consider an award of exemplary damages. *Exemplary damages may not be awarded to punish or to make an example of the defendant, but may only be awarded to compensate the plaintiff for any incremental or increased injury to plaintiff's feelings that you find were caused by defendant's bad faith or ill will.* However, you may not award exemplary damages for any injury to feelings which you include in your award of actual damages. [(emphasis added).]

Thus, consistent with *Foust*, 442 US 52, the standard civil jury instructions recognize that punitive damages are precluded.

yourselves determine what it was worth. What was it worth for Mr. Adair to be a union steward and believe in his union, file a grievance and then find out that they weren't going to help him because of an agreement that they entered into with the school. What—what is that worth? What is it worth for him to constantly keep asking questions and feel he's not getting an answer? What—what is that worth? What is it worth to file a grievance and now be laid off and never hear anything about the grievance? Never heard from the union, didn't know what happened to it. They don't know what happened to it. What is that worth? What is it worth to show up at your step two meeting, have your chief steward there and he not speak on your behalf? What is that worth? To actually have to argue your own grievances, what is that worth? So you show up at the—the third step hearing, you figure they didn't represent me at the first one, surely they won't represent me at this one either, but you didn't know that they were going to tell the people, say everything to him directly. They have nothing to do with you. It's as if you're not even a member. What is that worth? . . .

Here, plaintiff's argument at least marginally relates to emotional damages. However, soon afterwards, in discussing so-called "exemplary damages," plaintiff counsel shifts focus:

Here's where we get to the exemplary damages issues and what we're asking for. Mr. Adair paid, along with every other member of the [union], about seven dollars a month in union dues. It comes up to somewhere around, I believe . . . eight-hundred-forty dollars a year he was paying in union dues. That doesn't seem like a lot for one person. But when you take a look at the MEA's Website, you'll see that they represented in 2007 upwards of [130,000] members If you do the math, . . . this union brought in over . . . [\$66 million] in membership—²

Thus, immediately after discussing plaintiff's "emotional damages," plaintiff counsel's discussion of "exemplary damages" focuses on the union's finances, and then cites to the estimated income of the MEA; a non-party in this case.

Further, if there were any doubt that plaintiff counsel was suggesting that the jury punish defendant, plaintiff counsel then stated:

Okay. So what I stand before you to say is whether I give you an amount or not, that this union brings in, what is enough to make this union recognize that what it did was wrong? What is enough to hurt this union where it hurts most, in their pocket? Whatever the revenue this union receives, they receive it because they are supposed to represent the members. If they don't represent the members,

² At this point USTA objected, arguing that there was no evidence presented at trial in regard to the number of union members and total dues collected by the union. The trial court sustained the objection, except that plaintiff could argue with regard to how much he personally paid in dues, as there was record evidence on the matter.

then they shouldn't be paid at all. And certainly, that happened in this case. Eight years he paid union dues to get to a point where they failed to represent him at all.

Plaintiff's counsel then spoke of how the union's actions were reckless, were done with malice, and were deceitful. Counsel asked for \$700,000 in exemplary damages, and then told the jury, "[t]his is not a mom and pop shop. This is a conglomerate with over one-hundred-thirty-thousand members in 2007. How do you, as jurors, send a message that you are there to protect the rights of your members? How do you send that message?"

In discussing exemplary damages, plaintiff counsel only argued that defendant should be punished. How can any other conclusion be reached when plaintiff counsel states, "[w]hat is enough to hurt this union where it hurts most, in their pocket," and "[h]ow do you send that message." Indeed, that plaintiff counsel suggested \$700,000 in exemplary damages contradicts her earlier statements that emotional damages cannot definitively be ascertained. Rather, plaintiff counsel apparently proposed the \$700,000 in exemplary damages based on defendant's theoretical income; something not at all related to the proper measure exemplary damages. Even on appeal, at oral argument, plaintiff counsel continues to assert, erroneously, that the closing argument was proper because there is "no other way to get to this union besides a monetary penalty" and that her argument was intended to "make the union aware that they cannot behave this way," or that "they could not treat one of its own members this way." These statements clearly reflect an intent to punish defendant, not compensate plaintiff for injury.

While the majority concludes this inappropriate conduct can be overlooked because of an "absence of a definitive objection and the failure to properly preserve the issue," I would conclude the defendant sufficiently preserved the question for appellate review. Defendant's objection to the applicability of exemplary damages certainly preserves a challenge to an award entered for exemplary damages, particularly if the damages were actually punitive in nature. Requiring that defendant also request a curative instruction in regard to exemplary damages unduly elevates form over substance.

Moreover, this Court may review an issue if failure to consider it would result in manifest injustice. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005). Manifest injustice results if the defect constitutes plain error requiring a new trial or pertains to a basic and controlling issue. *Internat'l Union, UAW v Dorsey*, 268 Mich App 313, 324; 708 NW2d 717 (2005), rev'd in part on other grounds 474 Mich 1097; 711 NW2d 79 (2006). In my view, the trial court committed plain error by improperly instructing the jury to award exemplary damages for no other reason than defendant acted with recklessness, malice or deceit, regardless of any injury actually suffered by plaintiff. The instruction erroneously allows for the jury to punish defendant for acting with recklessness, malice or deceit. And given that plaintiff counsel expressly requested that the jury punish defendant, I can only conclude that the jury's award of exemplary damages was actually an award of punitive damages. I am clearly convinced that the jury's award of exemplary damages is actually an award of punitive damages. Further, as plaintiff counsel admits, emotional distress damages are exemplary damages. Thus, I would vacate the exemplary damage award and reinstate the \$10,000 award for emotional damages.

/s/ Brian K. Zahra